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the statute amended which were omitted from it, but it expressly so declared.

As said in the opinion by Riley, J., in *Somers' Case*, 97 Va. 759, 33 S. E. 381, a case in point here: "Where the later statute was plainly intended to embrace the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in it shall prevail and whatever is excluded is discharged and repealed." See, also, the authorities cited in that case, and *Curran v. Ownes*, *supra*.

We are of opinion that the decree appealed from in this case is erroneous, and it will be annulled, and this court will enter the decree that the corporation court of the city of Staunton should have entered, dismissing appellee's petition.

Reversed.

TERRELL v. CHESAPEAKE & O. RY. CO.

Nov. 18, 1909.

[66 S. E. 55.]

1. Railroads (§ 222*)—Nuisance—Roundhouse Yard—Private or Public Capacity.—Where a railroad company maintained certain tracks in its roundhouse yard on which it stored, blew out, cleaned, and fired engines, while not in use and in the open air, which constituted a nuisance to adjoining property, the railroad's acts were committed in its private and not in its public capacity; and hence it was liable to such adjoining property owners for the damage sustained without reference to whether its conduct was negligent or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 721; Dec. Dig. § 222.*]

2. Corporations (§ 382*)—Public Service Corporation—Duties of Nonpublic Nature.—A public service corporation in the performance of duties not of a public nature, though incidental to those of a public character, stands on the same footing as a private corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1517; Dec. Dig. § 382.*]

3. Railroads (§ 222*)—Roundhouse—Terminal Yards—Nuisance.—That a railroad company has legislative authority for the construction of workshops and yards within specified limits does not justify it as against a particular householder in so constructing its plant as to constitute a nuisance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 721; Dec. Dig. § 222.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Error to Corporation Court of Charlottesville.

Action by N. A. Terrell against the Chesapeake & Ohio Railway Company. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Reversed, demurrer overruled, and remanded.

Dabney & Fowler and *Micajah Woods*, for plaintiff in error.
D. H. & Walter Leake, for defendant in error.

CARDWELL, J. The plaintiff in error brought an action of trespass against the Chesapeake & Ohio Railway Company, and the declaration states that he was seised and possessed of a certain lot of land with a dwelling house thereon, known as No. 923 East Market street, in the city of Charlottesville, on the north side of said street, which lot fronts about 60 feet on said street and runs back in a northerly direction between parallel lines about 200 feet; that the Chesapeake & Ohio Railway Company, a corporation organized under the laws of the state of Virginia, was possessed of a certain lot of land lying on the south side of East Market street in said city, and directly opposite the plaintiff's premises; that on a part of its said lot, some time prior to the year 1903, the defendant erected a building known as a "roundhouse," but a large part of the defendant's lot in front of plaintiff's premises was prior to the year 1905 used for the purpose of receiving, storing, and delivering car and locomotive supplies and materials; that it became and was the duty of the defendant so reasonably to use its said lot as not to injure or interfere with the possession, use, and enjoyment by the plaintiff of his said property, "yet the said defendant, not regarding its said duty in this behalf, but contriving and wrongfully and unjustly intending to injure and aggrieve the said plaintiff in the use and possession of his said property, heretofore, to wit, on the ——— day of ———, 1905, laid on the said part of its said lot not occupied by the said roundhouse, and very near, to wit, 75 feet from and in front of the said plaintiff's property, a number of short railroad tracks, to wit, seven, in a segment or semicircle, which said tracks have been used by the said defendant for the purpose of standing, storing, and keeping such of its locomotives as were not in immediate use on divers days and times from the above date to the commencement of this suit;" that "here numbers of locomotives were kept by said defendant and cleaned, fired, steamed, and repaired, without any roundhouse or other structure inclosing or covering the same, and without smokestacks of sufficient height to carry the steam, smoke, dust, ashes, cinders, and odors above the said plaintiff's property;" that "from the engines so placed, hostled, tended, and handled there were daily and many times during the day and night the ringing of bells, the blowing

of whistles, the prolonged and deafening roar of steam when boilers were blown off to be washed, and the noise of blowers at work raising steam, and vast clouds of smoke, soot, dust, cinders, and ashes poured from the smokestacks of the said locomotives over, upon, into, and through and about the said plaintiff's dwelling and premises, and, when the doors and windows of the said dwelling were open for light and air, smoke, cinders, soot, ashes, and dust were discharged from said locomotives and blown in and through said doors and windows settling upon the occupants of the house, and upon the furniture and furnishings, soiling clothes, bedding, curtains, food, and other articles therein, and accompanied by foul and offensive odors which tainted and corrupted the atmosphere and rendered the dwelling and premises unhealthy and unfit for habitation, and also covered the shade trees in front of said dwelling with soot and dust, and blackened and destroyed them and the flowers and other vegetation on and about said premises, and by means of the said smoke, dust, and soot discharged as aforesaid on and about the said plaintiff's premises, the fences thereon and the front of his said dwelling have been blackened and rendered most dirty, disreputable and unsightly in appearance. And by reason of the aforesaid unreasonable, wrongful, and unjust use by the said defendant of its said premises the said plaintiff has been and is greatly damaged in the use and possession of his said property, and the marketable and rental value of the same has greatly depreciated by means of the committing of the grievances as aforesaid by the said defendant, to the damage of the said plaintiff \$1,500."

The defendant demurred to the declaration, in which demurrer the plaintiff joined; the grounds of demurrer being that no negligence on defendant's part is alleged, and that independent of negligence the defendant is not liable.

Upon the hearing of the cause upon the demurrer the corporation court of Charlottesville sustained the demurrer, and to that judgment this writ of error was awarded.

That the defendant is a public service corporation is not questioned, and it is also conceded that the declaration sets out a nuisance, but the claim is that it is not an actionable nuisance. Therefore the sole question for determination is whether the nuisance was committed by the defendant in its private capacity, or as incidental to its public function of running trains for the carrying of passengers and freight.

The declaration, it may be said, is in all of its essential features identical with that considered by this court in *Townsend v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, and the plaintiff urges that that case controls the decision in this; while the defendant, with equal

earnestness, claims that it is controlled by the earlier case of *Fisher v. Seaboard A. L. Ry. Co.*, 102 Va. 363, 46 S. E. 381.

In the earlier of these cases Fisher sued to recover damages for a nuisance caused by "running trains and locomotives over and upon" defendant's track and trestle; while in this case the declaration alleges that defendant used its lot in front of and adjacent to its roundhouse for the purpose of "standing, storing, and keeping such of its engines as were not in use," and "cleaning, firing, steaming, and repairing" same, and that "from the engines so placed, hosted, tended, and handled" the nuisance complained of resulted.

In the Townsend Case, as in this, negligence was not charged, but in both facts constituting the nuisance are duly alleged, and in the Townsend Case the operation of a power house for generating electricity to run an electric railway was the *modus injurie*, and this court, though conceding that the electric railway was a public service corporation with the power of eminent domain, held that it had no legislative authority to operate its power house to the injury of the plaintiff, Townsend, on the ground that such operation was not incidental to its public function of running cars; the opinion saying: "It is true that an electric railway cannot be operated without a power house. It is true that an engine house is a necessary adjunct to a steam railway; but they are incidents to the operation of the road with which the public has no concern."

It cannot be maintained that the storing, blowing out, cleaning, and firing of engines on an open yard is more incidental to the public function of carrying passengers than a roundhouse for the sheltering of engines, or a power house for the generation of electrical power. The one is not, when considered on a demurrer to a declaration or to a plea setting up such a defense, any more incidental to the performance of the public function of the carrier than the other. The true distinction between a public and a private function, when exercised by a public service corporation, is so lucidly and exhaustively drawn in the Townsend Case that little need be added to what is there said. As a preface to the discussion of the question in that case the opinion says: "A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law in may be required to do it cannot be considered as doing an unlawful act; and, if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

Authorities are cited with approval as follows: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of the house." Pollock on Torts (2d Ed.) p. 158.

"The common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public. The private part is its incidental business, with which the public is not concerned, and which the company manages for its own interest. The company carries passengers over its road as a public duty, but the generation of power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is a private business of the company." In re Rhode Island R. Co., 22 R. I. 457, 48 Atl. 592, 52 L. R. A. 879.

"But, over and beyond this, we think a corporation in selecting a place for its roundhouse acted in a private capacity and is responsible for the injurious consequences which may result from its use." L. & N. Term. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 957, 61 L. R. A. 192, citing Railroad v. Fifth Bap. Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; Cogswell v. Railroad, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701.

With respect to the Fifth Baptist Church Case, the learned counsel for the railway company in this case make the point that, while the opinion in that case used the expression, "A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity, there is nothing in the case with regard to the public and private capacity of a railroad; the decision being rested emphatically upon the proposition that in selecting the place for its roundhouse the railroad had made an unreasonable choice, a claim that is not made in the case at bar." This view of that case, however, was not taken by this court in the Townsend Case, nor in the large number of cases in which it has been cited with approval. It is not necessary to the liability of a public service corporation for a nuisance caused by an unlawful use of a power house, or of a site selected and used as a roundhouse, that the corporation had made an unreasonable selection, but the question in this, as in the Townsend Case, is: Was the corporation acting in its private capacity was distinguished from its public function, when operating the nuisance complained of? In the Townsend Case the corporation was held to be acting in its private capacity as distinguished from its public function when so operating its power house as to cause

a nuisance damaging to adjacent property owners, and the effort to distinguish that case from this is in vain.

It is very true that it is necessary for a public service corporation, having the franchise to construct and operate a railway line for the carrying of passengers and freight, to fire up and clean its engines for the purpose of performing its public functions; and it is equally true that it is necessary for a street railway to have and operate a power house for the generation of its transportation power, but the one in selecting and operating its power house, as well as the other in selecting a site for its roundhouse and making use thereof, is, as the great weight of the authorities conclusively show, to be held as acting in its private capacity, and not in the performance of its public function, and is liable, as a rule, for a nuisance resulting therefrom, even though the nuisance is not negligently caused. See report of the *Townsend Case*, with authorities, 4 L. R. A. (N. S.) 87.

In answer to the argument of the learned counsel for the railway company in this case that the view just stated is in conflict with the decision in the *Fisher Case*, and that this case is controlled by that case, and not the *Townsend Case*, we deem it only necessary to refer to the exhaustive opinion of Keith, P., in the last-named case, upon a petition for a rehearing where the authorities are reviewed at greater length than in the original opinion; the result being a denial of the prayer for a rehearing.

It is finally argued on behalf of the railway company in this case: "If the appellee is to be made to pay damages in this case, and this principle is established as the law in Virginia, then it is difficult to perceive how, where, and when a railroad company in this state may establish a permanent terminal yard on which it may do its business necessary to the 'hostling' of its engines. If said principle is once established, the running of trains upon the roads in this state will become difficult—at best, a most expensive matter—and possibly may be prevented entirely."

Similar suggestions as to the consequences of adhering to the rule of law established by the authorities applicable to cases of this character were made in the *Townsend Case*, to which the opinion replied as follows: "It would be a source of regret if, in the administration of justice by the establishment and enforcement of unsound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and

incentives to thorough investigation and careful consideration of the cause submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say, with the great Lord Mansfield, *Fiat justitia, ruat cælum.*”

We have not deemed it necessary to consider the argument of the learned counsel for the plaintiff, that, even if the nuisance complained of were done in the exercise of a public function, the demurrer to the declaration should be overruled, under section 58, art. 4, of the present Constitution (Code 1904, p. ccxxii), since the injury from the engines, as alleged in the declaration, was done after the adoption of the Constitution in 1902, when there was added to the provision of the former Constitution with respect to the taking of private property for public use the provision that damage to property, even for a public use, shall be compensated for. The purport and effect of this change in the Constitution, which we do not think is necessary to be considered again here, was fully considered and determined in *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 59 S. E. 407, 17 L. R. A. (N. S.) 1053, and we shall be content with a mere reference to the opinion in that case.

The decision of the *Townsend Case*, which is conclusive of this upon the demurrer to the declaration, was based upon the principle that a nuisance is unlawful; and, though an injury results from a lawful act, done without negligence, the injury is *damnum absque injuria*, yet, however careful one may maintain a nuisance, he is liable for the resulting injury to others. See, also, *Wood on Nuisances*, pp. 709, 1277, where the rule is clearly stated and discussed.

The principles of law applicable to such a case are also clearly and forcibly stated in 29 Cyc., pp. 1198-1199, as follows:

“A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury. So, in an action for a nuisance consisting of smoke entering plaintiff’s house from defendant’s chimneys, it is no defense that the chimneys are as high as the city regulations for chimneys require, if in fact, they are not high enough to keep the smoke out.

“It is a condition always implied by law that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons, and so the fact that a person or corporation has authority from the Legislature or a

municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance. Thus the fact that a railroad is constructed and operated under statutory authority does not deprive neighboring property owners of their remedy for annoyances and injuries not necessarily incident to the operation of the road in the vicinity. Neither can defendant's possession of the right of eminent domain legalize a nuisance, but, until defendant has exercised such power and by the authority thereof acquired plaintiff's property, defendant's illegal acts resulting in the substantial impairment or destruction of the property constitute an actionable nuisance."

See, also, *Rosenheimer v. Standard Gaslight Co.*, 36 App. Div. 1, 55 N. Y. Supp. 192; *Ganster v. Met. Elec. Co.*, 214 Pa. 628, 64 Atl. 91.

We are of opinion that the judgment of the corporation court sustaining the demurrer to the declaration in this case is erroneous. Therefore it will be reversed, the demurrer overruled, and the case remanded to be further proceeded with in accordance with the views herein expressed.

Reversed.

Note.

The subject of the liability of public service corporations for the nuisance caused by the smoke, noise and vibrations created by their operations, has been already considered in notes appended to the cases of *Townsend v. Norfolk Ry., etc., Co.*, 12 Va. Law Reg. 200, and *Tidewater Ry. Co. v. Shartzler*, 13 Id. 845, which see. Also lengthy and able annotations on the subject will be found in 70 L. R. A. at p. 579, in 1 L. R. A., N. S., at p. 49, and in 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519. Therefore in the main this note is confined to a few observations upon the position of the Virginia court as taken in the principal case and the *Fisher*, *Townsend* and *Shartzler* Cases.

The question for decision is stated (on p. 860, *supra*) to be whether the nuisance was committed by the defendant in its *private capacity*, or as *incidental to its public function* of running trains. The decision is, that functions or duties *incidental* to those of public character are on same footing as *mere functions of a private* character. Quære, need not the word "necessarily" precede "incidental" in the second alternative above stated.

The principal case adopts unreservedly the holding and principles of the *Townsend* Case, quoting largely from it, saying, among other things: "The true distinction between a public and a private function, when exercised by a public service corporation, is so lucidly and exhaustively drawn in the *Townsend* Case that little need be added to what is there said. As a preface to the discussion of the question in that case the opinion says: 'A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be required to do

it cannot be considered as doing an unlawful act; and, if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

The Fisher Case seems to be clearly distinguishable from both the principal case and the Townsend Case, and is so distinguished by the court in both cases. They found no conflict and none exists, in this aspect of the case at any rate.

In the Townsend Case it is said referring to the duties owed to the public which must be performed: "This aspect of the case was before this court in *Fisher v. Seaboard Air Line R. Co.*, 102 Va. 363, 46 S. E. 381, where it was said that a railroad company acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from noises, jarring, and shaking of buildings, or dust and smoke incident to the running of trains; for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way. To the authorities relied on in support of this case many others may be added."

The court adopts what was said in the opinion upon a rehearing of the Townsend Case, as follows: "It may be that in the distribution of the duties of a public service corporation into those of a public and those of a private nature, the classification was inaccurate and unscientific, though it has the sanction of courts of the highest respectability. By other courts the same conclusion is reached by a consideration of the language used by the Legislature in the act of incorporation, and by its construction determining whether or not the lawmaking power intended to permit an act to be done, or to require its performance—to confer a privilege, or to impose a duty. In the case of *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381, the position of this court is well stated in the syllabus: * * * (See holding set out above.) This is to be understood, of course, in the light of the facts presented in that record, where damages were claimed for the noises, jarring and shaking of buildings, dust and smoke incident to the running of trains. We are of opinion that in the absence of negligence, no damages could be recovered, for the reason that the road was obliged to run its trains, which could not be done, whatever the degree of caution exercised, without the inconveniences and injuries enumerated." *Townsend v. Norfolk Ry., etc., Co.*, 105 Va. 22, 52 S. E. 970, 12 Va. Law Reg. 200, 210.

In order to justify an injury to private property, the statutory sanction must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 2 N. E. 246, 9 L. R. A. 711.

Some Late Cases.—The damages resulting from smoke, cinders, vibration, etc., are proper elements to be taken into consideration in an action for injury to real property resulting from the operation of a railroad. *Danville, etc., R. Co. v. Fedrick*, 137 Ill. App. 553.

Where a railroad company, having been granted a right of way along a street in a city, turned the same into a yard for switching purposes, causing irreparable damage by vibration and noises to a hotel, near but not abutting on the street, it was held that such act constituted a taking of the street for a private and not a public use, and became a nuisance, for which there was no adequate remedy at law, which could be restrained at the suit of the hotel owner.

Galveston, H. & S. A. Ry. Co. *v.* De Groff (Tex.), 110 S. W. 1006.

For the use of a street by a railway company for yard purposes is a private and not a public use, and, if it injuriously affects adjacent property, is a private nuisance.

Galveston, H. & S. A. Ry. Co. *v.* De Groff (Tex.), 110 S. W. 1006, 1011, citing M., K. & T. Ry. *v.* Anderson (Tex. Civ. App.), 81 S. W. 782; G., H. & S. A. Ry. *v.* Miller (Tex. Civ. App.), 93 S. W. 177.

In Schier *v.* Cane Belt Ry. Co. (Tex.), 100 S. W. 360, a railroad company was held liable in damages for noise, smoke and cinders produced by operating its trains in a street in front of plaintiff's property; and in Gulf, etc., Ry. Co. *v.* Blue (Tex.), 102 S. W. 128, damages to real estate, in consequence of the construction of railroad stock-pens near thereto, were recovered, although property generally had increased in value there. And in Missouri, etc., Ry. Co. *v.* Perry (Tex.), 102 S. W. 1169, damages resulting from the establishment of a turntable and water-tank on the right of way were recovered.

See also the similar Texas cases of Texas, etc., Ry. Co. *v.* Edrington, 102 S. W. 1171, and Schueller *v.* San Antonio, etc., Ry. Co., 102 S. W. 922, where damages to property from vibration caused by the passage of trains was recovered. See, also, Rainey *v.* Red River, etc., R. Co. (Tex.), 89 S. W. 768, 3 L. R. A., N. S., 590, where it was held that the coal-bins, shops and other terminal facilities of a railroad yard constituted an actionable nuisance.

Thus it would seem that in Texas, even a public use does not absolve from payment for damages caused thereby to adjacent private property.

See Lewis *v.* Colorado, etc., R. Co., 122 La. —, 47 So. 906, where it was held that, although the municipality had the right to grant the franchise to the defendant company to construct its track through a public street, it did not grant it the right to impair the value of property by its roadbed and track, and the railroad company was liable for such impairment.

And it has been held that the maintenance of stock pens, constituting a nuisance to neighboring property, is not an absolute right conferred upon a railroad corporation by statutory authority to erect on rights of way all necessary and convenient structures and fixtures, for transportation of freight and passengers. Missouri, etc., Ry. Co. *v.* Mott (Tex.), 70 L. R. A. 579. See, also, Shively *v.* Cedar Rapids, etc., R. Co., 74 Io. 169, 7 Am. St. Rep. 471, 37 N. W. 133.

But in Thomason *v.* Seaboard Air Line Ry., 142 N. C. 322, 55 S. E. 205, followed in Taylor *v.* Same (N. C.), 59 S. E. 129, upon a very similar state of facts to those in the principal case, the opposite conclusion is reached, citing the Fisher Case as authority among others.

Here it was held that use by a railroad company of side tracks on its right of way for its regular traffic and for the storing of engines used on the branch line, in a reasonable manner, is not a nuisance for which it is liable to an adjoining owner, though causing annoyance and injury to his property by reason of the noise, smoke, cinders, and vibration incident to such use. Thomason *v.* Seaboard Air Line Ry., 55 S. E. 205.

And that a railroad company owning a short line has consolidated with other companies so as to form a through line, whereby the use of the right of way at a particular station is greatly increased, to the increased annoyance of an abutting owner, does not affect such owner's rights as against the railroad. Thomason *v.* Seaboard Air Line Ry., 55 S. E. 205.

And noises of locomotives, shifting of cars, smoke, offensive

odors, loading and unloading of freight, and the like, occasioned by and incident to the use and conduct of a railroad freight and passenger terminal, and resulting in damage to premises as a place of religious worship and residence of the pastor, do not constitute an actionable nuisance, where the railroad company conducts its operations with reasonable care. *Taylor v. Seaboard Air Line Ry.*, 59 S. F. 129, following the *Thomason Case*, 142 N. C. 318, 55 S. E. 205.

Nor does the running of trains and shifting of cars on Sunday, at the time of the regular church services held on premises near the railroad freight and passenger terminal, per se constitute a nuisance, since under the express provisions of Revisal 1905, § 2613, a railroad company may operate its trains on Sunday; but it must further appear that the same was done in an unreasonable or improper manner. *Taylor v. Seaboard Air Line Ry.*, 59 S. E. 129.

In this case it was said: "It is therefore manifest from an unbroken line of precedents that the mere establishment and proper use of a freight and passenger station across the street from plaintiffs' property does not constitute an actionable nuisance. Having been established by authority of law, all damage that flows from its reasonable and proper use is *damnum absque injuria*. 2 Elliott on R. R. 718; 2 Wood on Nuisance, § 753; *R. R. & Banking Co. v. Maddox*, 116 Ga. 64, 42 S. E. 321, 19 Am. & Eng. (1st Ed.) 923, 924, and cases there collected. And it further follows that injuries and inconveniences to those who reside near this terminal from noises of locomotives, shifting of cars, loading and unloading freight, smoke and the like, which result from the necessary, and therefore proper, use and conduct of the terminal, are not actionable nuisances, but are the necessary concomitants of defendant's franchise. *Wood, R. R.*, p. 722; *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164; *R. R. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84. While we hold that a railway lawfully operated with reasonable care, however disagreeable it may be to the residents of the neighborhood, is not an actionable nuisance, we are far from holding that it cannot be so operated and conducted as to become one. The *Baptist Church Case*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, is a weighty and often cited authority illustrative of the lawful and unlawful use of railroad property. The railroad had located an engine house away from its business terminal, close under the eaves of the church windows, and had erected 16 smokestacks lower than the church windows, almost up against them, and so constructed that the volume of smoke from each stack poured directly into the body of the church. The Supreme Court of the United States applied the law of nuisance wholly independent of reasons of public policy and business convenience, for no such considerations required the construction of a round-house immediately under the eaves of a church. But in that case the court holds that for all usual and necessary noises and inconveniences occasioned by the operation of the railway, as such, in the discharge of its public duty, a property owner cannot recover." *Taylor v. Seaboard Air Line Ry.*, 59 S. E. 129, 131.

Where there is no physical taking and no charge of negligent construction or maintenance, damages cannot be recovered for injury to real property arising by reason of noise from the construction and maintenance by a traction company upon its own land, of a station and loop. *Griveau v. South Chicago, etc., Ry. Co.*, 130 Ill. App. 519.

If a railroad which causes injury to adjacent property is authorized by law and is carefully and properly constructed, without negligence in its construction, operation, or maintenance, there is no

liability if the right to such construction and maintenance has once been obtained and compensated for. *Melindy v. Chicago, etc., Ry. Co.*, 132 Ill. App. 431.

But the great majority of cases seem to announce the liability of the railroad wherever the creation of the nuisance, if not due to the actual operation of the railroad as a railroad, was not absolutely necessary thereto, i. e., if it could have been omitted or carried out elsewhere or in another mode without serious detriment to the public service. See *Cooper v. North Brittish R. Co.*, 1 Macph. Sc. Sess. Cas. 499 (rail-hardening works); *Louisville, M. Term. Co. v. Jacobs*, 109 Tenn. 727, 61 L. R. A. 188, 72 S. W. 954 (round-house), approved and followed in *Missouri, etc., R. Co. v. Anderson*, 81 S. W. 781; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739 (engine-house and shops); *Chicago, etc., R. Co. v. First M. E. Church*, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85 (Water-tank and passenger station in street); *Tuebner v. California Street R. Co.*, 66 Cal. 171, 4 Pac. 1162 (a power-house case strikingly like the *Townsend Case*); *Penn. R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432 (side tracks used as yard); *Spring v. Delaware, etc., R. Co.*, 88 Hun. 385, 34 N. Y. Supp. 810, aff'd 157 N. Y. 692, 51 N. E. 1094 (case of a coal-bin for coaling engines); *Riggs v. Penn. R. Co.*, 58 N. J. Eq. 172, 43 Atl. 275 (a case of a street used as a yard); *Gareau v. Montreal Street R. Co.*, 31 Can. S. C. 463; *Boudreau v. Same*, Rap. Jud. Quebec, 13 B. R. 531 (case of a power-house constituting a nuisance); *Louisville M. T. Co. v. Lellyett (Tenn.)*, 1 L. R. A., N. S., 49 (a round-house case).

As to liability for the necessary, and lawful incidents to the running of trains, such as smoke, soot, gas and noise, see note in 1 L. R. A., N. S., 49, upon the power of legislatures to legalize a nuisance and prevent a recovery for consequential injuries.

Effect of Constitution of 1904.—It will be noted that the court does not consider the argument of the plaintiff, that even if the nuisance was the result of the exercise of a public function, the company was liable nevertheless, under the constitution of 1904 (Code 1904, p. ccxxii) forbidding the *damaging* of private property for public use without compensation, referring to the effect of that change in the constitution as "fully considered and determined" in *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 59 S. E. 407, 17 L. R. A., N. S., 1053.

It might be a question just what the court meant by this, as that was a case of damages allowed in a condemnation proceeding, and while it was there held that any substantial damage, although consequential, must be paid for in such a proceeding, it also endorsed the statement, made in *Lewis on Eminent Domain*, § 230, that the question whether such an impairment of property constituted an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken.

It was held in the *Shartzter Case* that in view of the terms of the prior Constitution and statutes, Const. 1902, art. 4, § 58, inserting "or damaged" in the provision prohibiting the General Assembly from authorizing property to be taken without just compensation, and Code 1904, § 1005f, providing for assessing compensation for damages to adjacent property not taken, was intended to enlarge the rights to compensation, and embraces and gives a remedy for impairment of property by noise, smoke, dust, and cinders arising from the lawful operation of a railroad, and was not intended merely to cover such damages as would have previously formed the basis of an action at common law or under the general statutes. *Tidewater*

Ry. Co. v. Shartzter, 107 Va. 562, 59 S. E. 407, 17 L. R. A., N. S., 1053, 13 Va. L. Reg. 845.

The court said: "No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust, and cinders arising from the ordinary and lawful operation of a railroad, are the subject of compensation, under the provisions of our Constitution and Laws. 'The operation of a railroad,' says Lewis on Em. Dom., § 230, 'the switching of cars to and fro, the use of coal-bins, stock-yards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking we have already considered. But, whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent constitutions. Where the use and operation of a railroad * * * depreciates the value of property by reason of the noise, smoke, vibration, etc., his property is damaged within the Constitution, and he is entitled to compensation.'" *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 59 S. E. 407, 17 L. R. A., N. S., 1053, 13 Va. L. Reg. 845, 852.

And again: "*In Chicago & W. I. R. Co. v. Ayers*, 106 Ill. 511, the court observes: 'It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question.' The Supreme Court of the United States, in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, referring to the Illinois cases, says: 'We concur in that interpretation. The use of the word "damaged" in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.'" *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 59 S. E. 407, 17 L. R. A., N. S., 1053, 13 Va. L. Reg. 845, 850.

The Fisher Case was decided under the constitutional provision which merely prohibited the taking of private property for public

use without compensation. This case seems to have been out of line with the weight of authority, and it would seem likely that if a similar case arose again under the Constitution, as it stands now, the decision upon the question of the liability would very possibly be different. It is interesting to note in this connection the comment of the editor of the L. R. A. upon the Townsend Case: "Although the courts have had much difficulty in answering the question whether or not a corporation acting under authority of the legislature is liable to abutting property owners for the creation of a nuisance, they have practically agreed, as held in the above case, that, in order to secure absolution, the corporation must act strictly within the limits of the authority given. The authorities upon this subject are gathered in a note to Missouri, K. & T. R. Co. v. Mott, 70 L. R. R. 579, and there is a strong trend of authority in the direction of the rule that the legislature has no constitutional authority to grant absolution. The authorities upon this phase of the question and a full discussion of the principles involved will be found in a note to Louisville & N. Terminal Co. v. Lellyett, 1 L. R. A. (N. S.) 49."

It should be observed that the Fisher Case relies largely upon English cases, decided with reference to the omnipotent power of the English Parliament, and the whole principle that for the doing of an authorized act in an authorized way, no action lies, depends upon the legality of the authority, and that is what it is the modern tendency of the decisions to question and deny. But it is undeniable that the *damnum absque injuria* doctrine is affirmed in many cases of weight, among them the Baptist Church Case in 108 U. S. 317, 27 L. Ed. 739; Beseman v. Penn. R. Co. (N. J.), 13 Atl. 164; Ridge v. Railroad Co. (N. J. Ch.), 43 Atl. 276; Taylor v. Seaboard Air Line R. (N. C.), 59 S. E. 129, 131, and many others.

As to the argument *ab inconvenienti* and consequences of imposing such a rule of liability on railroads, etc., it may be disposed of in the words of the court in the principal case:

"It is finally argued on behalf of the railway company in this case: 'If the appellee is to be made to pay damages in this case, and this principle is established as the law in Virginia, then it is difficult to perceive how, where, and when a railroad company in this state may establish a permanent terminal yard on which it may do its business necessary to the "hostling" of its engines. If said principle is once established, the running of trains upon the roads in this state will become difficult—at best, a most expensive matter—and possibly may be prevented entirely.'

"Similar suggestions as to the consequences of adhering to the rule of law established by the authorities applicable to cases of this character were made in the Townsend Case, to which the opinion replied as follows: 'It would be a source of regret if, in the administration of justice by the establishment and enforcement of unsound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the cause submitted to them. Those duties being faithfully performed, courts may await the result with patience,

if not always with confidence, and say, with the great Lord Mansfield, "*Fiat justitia, ruat cælum.*"

This argument is forcibly expressed in *Thomason v. Seaboard Air Line Ry.*, 53 S. E. 205, 207, as follows: "Chief Justice Beasley, in *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164, says: 'If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to plaintiffs' property, so it must be as to all property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all. * * * The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested.' He proceeds to show that if such actions may be maintained, it would be impracticable to operate railroads. In the case of *B. & P. R. R. v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, upon the authority of which we held defendant liable on its appeal, Field, J., drawing the distinction, says: 'Undoubtedly a railway over the public highways * * * may be authorized, * * * and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is inconvenienced. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience, in such case, must be suffered for the public accommodation.'"

Conclusions.—If public service corporations are to be free from pecuniary liability for the consequences of the exercise of their public functions, it is suggested that the true criterion as to the liability of a public service corporation for a nuisance created as an incident to its operations, seems to be, was the state of facts causing the nuisance *necessarily incidental* to the discharge of its public duties, or not. In other words, would it have been practicable to discharge them without creating the nuisance, or not. If so it is liable, without allegation or proof of negligence. Otherwise it is not liable unless negligence is alleged and shown.

The situation, in a few words, is this: The Fisher Case was decided, no doubt correctly, under a constitution which did not require property damaged for public use to be paid for. The Townsend and Terrell Cases, decided under a constitution containing such a requisition, draw a distinction between a public function or duty and a private function merely incidental thereto, holding that for a nuisance in performing the latter, a public service corporation is liable, and intimating that for the former it would not be liable in the absence of negligence. The direct holding is undoubtedly sound, and is overwhelmingly supported by authority, but a case analogous to the Fisher Case, if it arose and were so decided now, would be distinctly against the trend of the best considered modern cases decided under similar constitutional provisions. We cannot but hope that when such a case arises, the true doctrine that if private property is materially damaged, although in the exercise of a purely public function by a public service corporation, compensation must be made, if not already made when the right of

way was acquired. We do not think we can do better than close by repeating a part of the conclusions reached by the able editor of the *L. R. A.* in a long note appended to *Louisville, etc., Co. v. Lillyett*, 1 *L. R. A.*, N. S., 49, 136: "If such special immunity could not be given to an individual, it certainly cannot be given to a private corporation, since the artificial being has no greater rights or privileges under the government than has the natural person, its creator, and can be given none. But when the private corporation is organized to perform a public service, many courts have lost their bearings. Because it is necessary, in order for them to attain the objects of their creation, to exercise a portion of the governmental right of eminent domain, the courts have become confused, and regarded them as likewise possessing the immunities of government. Therefore it has been said that if the transaction of the business for which they are organized necessarily results in a private nuisance, the individual, and not the corporation, must bear the loss, in order to protect the public from inconvenience. But this conclusion by no means follows from the premises. A public service corporation is precisely like any private corporation, with the exception that it is permitted to exercise the paramount power of the state to attain its objects. It can take what property it needs, wherever it can find it, upon paying for it; and although in the transaction of its business it causes injury to private property, no individual can stop such business, whatever injury it causes, provided it is willing to make good the injury. But with regard to such injury it has no greater immunity from liability to make it good than a private citizen, and the legislature can give it none. That matter is of no interest or concern to the public, but it is merely a question whether the cost of the enterprise, which includes the damage caused by it, shall be borne by the private corporation, which is to obtain the profits, or by the private citizen, who has no interest in it other than as one of the public. The answer to this question, upon principles of justice, and upon those at the foundation of our government, seems so plain that it is strange that more than one answer should be given. The cost should be borne by the corporation which has undertaken to bear it, and this cost includes the depreciation in the value of adjoining property by reason of the business proving a nuisance to it; and the legislature cannot decree otherwise."

This is forcibly expressed in a Texas case, as follows: "As is said by the Supreme Court in *Rainey v. Red River, Texas & S. R. Co.* (Tex.), 89 S. W. 768, 3 *L. R. A.*, N. S., 590: 'A railroad company is organized for the performance of duties to the public, as well as for private emolument; and when such is the case, the legislature may legalize the nuisance, provided always the damages be fully compensated by the payment of money.' Though our Constitution provides that private property shall not be damaged for public use without compensation, this does not, under the decision referred to, which is in accord with the weight of authority, inhibit the Legislature from authorizing a nuisance when the interest of the public requires acts to be done which, in themselves, create a condition which is a nuisance. But though the act is authorized by the Legislature, its effect must be considered with a view to the rights of the individual affected by it, as well as to the interest of the public. With an eye to public interest it may be right; but from the viewpoint of the individual, whose rights are affected by it, may be wrong. While the rights of the individual must yield to the interest of the public, he cannot rightfully be deprived of

them until the public has justly compensated him for what it demands for its use. As a government is created and only rightfully exists by the consent of the governed, and is but the expression of their aggregate will, designed to secure and protect them in the enjoyment of life, liberty, and property, it cannot, unless forfeited by his own misconduct, rightfully take from the individual for its use that which it was organized to secure and protect him in the enjoyment of, without rendering unto him full and just compensation therefor. Whenever a government undertakes, in the interest of the public, to delegate to a corporation, private or municipal, its authority to take or injuriously affect the property of an individual, it can grant only such power as itself has; for it cannot delegate to another a power that it does not and from its very nature cannot possess. When this power has been delegated, it must be strictly construed; and unless it has been delegated, it cannot be exercised by another." *Galveston, H. & S. A. Ry. Co. v. DeGroff* (Tex.), 110 S. W. 1006, 1010. J. F. M.

JACKSON et al. v. JACKSON et al.

Nov. 18, 1909. Rehearing Denied Jan. 13, 1910.

[66 S. E. 721.]

Partition (§ 77*)—Allotment to Part of the Heirs.—Code 1904, § 2653, permits any two or more tenants in common to have their shares laid off together when partition can be conveniently made in that way, and section 2564 provides that, when partition cannot be conveniently made, the property may be allotted to any party who will accept it and pay to the others such sum as their interest entitles them to; or if the interests of those entitled will be promoted by the allotment of part of the property, and a sale of the residue, the court may order such sale and allotment, and distribute the proceeds of the sale according to the rights of those entitled. Held, that the provision permitting the allotment of part meant an allotment of such part in equal proportions to all persons entitled to share in the partition, the part of the property not susceptible of partition to be sold, and the proceeds divided among all the parties according to their rights, so that, in absence of the consent of all parties, the shares of two tenants in common could not be allotted in kind, and the balance of the property, which could not be conveniently partitioned, sold, and the proceeds divided among the remaining tenants.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 212; Dec. Dig. § 77.*]

Appeal from Circuit Court. Augusta County.

Bill by Ernest M. Jackson and others to partition a decedent's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.